

THE STATE BAR OF CALIFORNIA

DO I

NEED

ESTATE

PLANNING?

GET THE  
LEGAL  
FACTS  
OF LIFE

# Do I need estate planning?

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# 1 *What is estate planning?*

Estate planning is a process. It involves **people**—your family, other individuals and in many cases charitable organizations of your choice. It also involves your **assets** and all the various forms of ownership and title that those assets may take.

As you plan your estate, you will consider:

- How your assets will be managed for your benefit if you are unable to do so.
- When certain assets will be transferred to others, either during your lifetime, at your death, or sometime after your death.
- To whom those assets will pass.

Estate planning also addresses your welfare and needs, planning for your own personal and health care if you are no longer able to care for yourself. Like many people, you may at first think that estate planning is simply the writing of a will. But it encompasses much more. As you will see, estate planning may involve financial, tax, medical and business planning. A will is one part of that planning process, but other documents are needed to fully address your estate planning needs. The purpose of this pamphlet is to summarize the estate planning process and how it can address and meet your goals and objectives.

As you consider it further, you will realize that estate planning is a dynamic process. Just as people and assets and laws change, it may well be necessary to adjust your estate plan every so often to reflect those changes.

# 2 *What is involved in estate planning?*

In starting to consider your estate plan, you should ask yourself the following questions:

- What are my assets and what is their approximate value?
- Whom do I want to receive those assets—and when?

- Who should manage those assets if I cannot, either during my lifetime or after my death?
- Who should have the responsibility for the care of my minor children if I become incapacitated or die?
- If I cannot take care of myself, who should make decisions on my behalf concerning my care and welfare?

With tentative answers to these questions, you are ready to seek the advice and services of a qualified lawyer who will discuss with you the various documents which can comprise your estate plan and will provide advice concerning such issues as title to assets, taxes, and the prudent management of your estate.

### **3** *Who needs estate planning?*

Whatever the size of your estate, you should designate the person who, in the event of your incapacity, will have the responsibility for the management of your assets and your care, including the authority to make health care decisions on your behalf. How that is accomplished is discussed below in this pamphlet.

If your estate is small in value, you may focus simply upon who is to receive your assets after your death and who should be in charge of its management and distribution. If your estate is larger, your lawyer will discuss with you not only who is to receive your assets and when, but also various ways to preserve your assets for your beneficiaries and to reduce or postpone the amount of estate tax which otherwise might be payable on your death.

If one does no planning, then California law provides for the court appointment of persons to take responsibility for your personal care and assets. California also provides for the distribution of assets in your name to your heirs pursuant to a set of rules to be followed if you die without a will; this is known as “intestate succession.” Contrary to popular myth, if you die without a will, everything does not automatically go to the state. Your relatives, no matter how remote, and in some cases the relatives of your spouse, will have priority in inheritance ahead of the state. Nonetheless, they may not be the people you

would want to inherit from you; therefore, a will is the preferable approach.

## **4** *What is included in my estate?*

Your estate consists of all property or interests in property which you own. The simplest examples are those assets which are in your name alone, such as a bank account, real estate, stocks and bonds, and furniture, furnishings and jewelry.

You may also hold property in many forms of title other than in your name alone. Joint tenancy is a common form of ownership which takes assets away from control by will or living trust. Beneficiary designations on securities accounts and bank accounts are alternatives which must be carefully considered as well. Finally, assets which have beneficiary designations, such as life insurance, IRAs, qualified retirement plans and some annuities are very important parts of your estate which require careful coordination with your other assets in developing your estate plan.

The value of your estate is equal to the “fair market value” of each asset that you own, minus your debts including a mortgage on your home or a loan on your car.

The value of your estate is important in determining whether, and to what extent, your estate will be subject to estate taxes upon your death. Planning for the resources needed to meet that obligation at your death is another important part of the estate planning process.

## **5** *What is a will?*

A will is a traditional legal document which is effective only at your death to:

- Name individuals (or charitable organizations) to receive your assets upon your death (either by outright gift or in trust).
- Nominate an executor, appointed and supervised by the probate court, to manage your estate, pay debts and expenses, pay taxes, and distribute your estate in an accountable manner and in accordance with your will.
- Nominate the guardians of the person and

estate of your minor children, to care and provide for your minor children.

Assets or interests in property in your name alone at your death will be subject to your will and subject to the administration of the probate court, generally in the county where you reside at your death.

The State Bar has published a pamphlet entitled *Do I Need a Will?* which provides more detailed information about wills. For information on how to order a complimentary copy, call 415-538-2280. Or visit the State Bar's web site — [www.calbar.ca.gov](http://www.calbar.ca.gov) — where you'll find the State Bar's consumer education pamphlets, as well as information on ordering them.

For some people, a California Statutory Will may be appropriate. This is a "fill in the blank" form which can be used by any California resident competent to make a will. In any event, you must execute your will in the manner required by California law. Failure to do so may invalidate your entire will. You should discuss the requirements of properly executing your will with a qualified lawyer.

## **6** *What is a revocable living trust?*

A revocable living trust is also commonly referred to as a revocable inter vivos trust, a grantor trust or, simply, a living trust. A living trust may be amended or revoked by the person creating it (commonly known as a "trustor," "grantor," or "settlor") at any time during the trustor's lifetime, as long as the trustor is competent.

A trust is a written agreement between the individual creating the trust and the person or institution named to manage the assets held in the trust (the "trustee"). In many cases, it is appropriate for you to be the initial trustee of your living trust, until management assistance is anticipated or required, at which point your trust should designate an individual or bank or trust company to act in your place. The terms of the trust become irrevocable upon the trustor's death. Because the trust contains provisions which provide for the distribution of your assets on and after your death, the trust acts as a substitute for your will, and eliminates the need for the probate of your will with respect to those assets which were held in your living trust at your death.

You should execute a will even if you have a living trust. That will is usually a “pour over” will which provides for the transfer of any assets held in your name at your death to the trustee of your living trust, so that those assets may be distributed in accordance with your wishes as set forth in your living trust.

The State Bar has published a pamphlet entitled *Do I Need a Living Trust?* which provides more detailed information about trusts. Call 415-538-2280 for information on ordering a complimentary copy. Or visit the State Bar’s web site at **[www.calbar.ca.gov](http://www.calbar.ca.gov)**.

You should consult with a qualified estate planning lawyer to assist you in the preparation of a living trust, will and other estate planning documents. Further, inasmuch as living trusts are not automatically subject to probate court jurisdiction, the choice of a trustee to manage and control your property is an extremely important decision.

## **7** *What is probate?*

Probate is the court-supervised process developed under California law which has as its goal the transfer of your assets at your death to the beneficiaries set forth in your will, and in the manner prescribed by your will. It also provides for the relatively quick determination of valid claims of any creditors who have claims against your assets at your death. At the beginning of a probate administration, a petition is filed with the court, usually by the person or institution named in your will as executor. After notice is given, and a hearing is held, your will is admitted to probate and an executor is appointed. If you die “intestate” (that is, without a will), your estate is still subject to probate court administration and the person appointed by the court to handle your estate is known as the “administrator.”

If the assets in your name alone at your death have a total value of less than \$100,000, then generally the beneficiaries under your will may follow a statutory procedure to effect the transfer of those assets pursuant to your will, subject to your debts and expenses, without involving the probate court, except as to real estate interests, which require a simplified court proceeding.

A probate has advantages and disadvantages. The probate court is accustomed to resolving disputes about the distribution of your

assets in a relatively expeditious fashion and in accordance with defined rules. In addition, you are assured that the actions and accountings of your executor will be reviewed and approved by the probate court.

Disadvantages of a probate include its public nature; your estate plan and the value of your assets become a public record. Also, because lawyer's fees and executor's commissions are based upon a statutory fee schedule, the expenses may be greater than the expenses incurred by a comparable estate managed and distributed under a living trust. Time can also be a factor; often distributions can be made pursuant to a living trust more quickly than in a probate proceeding.

The advantages and disadvantages of a probate proceeding should be discussed thoroughly with your estate planning lawyer.

## **8** *To whom should I leave my assets?*

Once you have determined who should receive your assets at your death, your estate planning lawyer can help you clarify and appropriately identify your beneficiaries. For instance, it is most important to clearly identify by correct name any charitable organizations you wish to provide for; many have similar names and in some families, individuals have similar or even identical names.

It is also important for you to consider alternative distributions of assets in the event that your primary beneficiary does not survive you.

As for beneficiaries who by reason of age or other infirmity may not be able to handle assets distributed to them outright, trusts for their benefit may be created under your will or living trust.

## **9** *Whom should I name as my executor or trustee?*

After your death, the executor of your will and the trustee of your living trust serve almost identical functions. Both are responsible for ensuring that your wishes, as set forth in your will or living trust, are implemented. Although your executor is generally subject to direct court supervision, both the executor and the trustee have similar fiduciary responsibilities. The trustee of your living trust may assume responsibilities under that document



while you are living. While you may act as the initial trustee of your living trust, if you become incapable of functioning as a trustee, the designated successor trustee will then step in to manage your assets for your benefit.

An executor or trustee may be a spouse, adult children, other relatives, a domestic partner, family friends, business associates or a professional fiduciary such as a bank. You should discuss your choice with your estate planning lawyer. There are a number of issues to consider. For example, will the appointment of one of your adult children cause undue stress in his or her relations with siblings? What conflicts of interest are created if a business associate or partner is named as your executor or trustee? Will the person named as executor or successor trustee have the time, organizational ability, and experience to do the job effectively?

## **10** *How should I provide for my minor children?*

A minor child is a child under 18 years of age. If both parents are deceased, a minor child is not legally qualified under California law to care for himself or herself. In your will, therefore, you should nominate a guardian of the person of your minor children to supervise that child and be responsible for his or her care until the child is 18 years old.

Such a nomination can avoid a “tug of war” between well-meaning family members and others if a guardian is required.

A minor is also not legally qualified to manage his or her own property. Assets transferred outright to a minor must be held for the minor’s benefit by a guardian of the child’s estate, until the child attains 18 years of age. You should nominate such a guardian in your will as well. In providing for minor children in your estate plan, you should consider the use of a trust for the child’s benefit, to be held, administered and distributed for the child’s benefit until the child is at least 18 years old or of some other age as you may decide. You may also consider a custodian account under the California Uniform Transfers to Minors Act as an alternative in making specific gifts to minors.

## **11** *When does estate planning involve tax planning?*

Estate taxes are imposed upon an estate which has a net value—in 2002 and 2003—of \$1 million or more. Under current law, that amount will increase to \$1.5 million in 2004 and 2005, and to \$2 million in 2006 through 2008. For estates which approach or exceed this value, significant estate taxes can be saved by proper estate planning, usually before death and, in the case of married couples, before the death of the first spouse. Estate planning for taxation purposes must take into account not only estate taxes, but also income, gift, property and generation-skipping taxes as well. Qualified legal advice about taxes should be obtained during the estate planning process.

## **12** *How does the way in which I hold title make a difference?*

The nature of your assets and how you hold title to those assets is a critical factor in the estate planning process. Before you change title to an asset, you should understand the tax and other consequences of any proposed change. Your estate planning lawyer will be able to advise you.

- **Community property and separate property.**

If you are married, assets earned by either you or your spouse while married and while a resident of California are community property. On the other hand, a married individual may own separate property as a result of assets owned prior to marriage or received by gift or inheritance during marriage. There are significant tax considerations which need to be addressed in the estate planning process with respect to both community property and separate property. There are also significant property interests to consider.

Separate property can be “transmuted” (that is, changed) to community property by a written agreement signed by both spouses and drafted in conformity with California law.

It is important to seek competent legal advice when determining what character your property is and how the property should be titled.

- **Joint tenancy property.** Regardless of its source, if a property is held in joint tenancy, it will

pass to the surviving joint tenant by operation of law upon the death of the first joint tenant. On the other hand, property held as community property or as tenants in common, will be subject to the will of a deceased owner.

- **Community property with right of survivorship.** Married couples may hold title to their community property in their names as “community property with right of survivorship.” Property held in that manner at the death of the first spouse is not affected by that spouse’s will, but passes instead to the surviving spouse.

## **13** *What are other methods of leaving property?*

A number of assets are transferred at death by beneficiary designation, such as:

- Life insurance proceeds.
- Qualified or non-qualified retirement plans, including 401(k) plans and IRAs.
- Certain “trustee” bank accounts.
- “Transfer on death” (or “TOD”) securities accounts.
- “Pay on death” (or “POD”) assets, a common title on U.S. savings bonds.

These beneficiary designations must be carefully coordinated with your overall estate plan. Your will does not govern the distribution of these assets.

## **14** *What if I become unable to care for myself?*

If you do not make any arrangements in advance, a court-supervised conservatorship proceeding may be required if you become incapacitated.

Conservatorships are proceedings which allow the court to appoint the person responsible for your care and for the management of your estate if you are unable to do so yourself.

You should, therefore, select the person or persons you wish to care for you and your estate in

the event that you become incapable of managing your assets or providing for your own care.

With respect to the management of your assets, the trustee of your living trust will provide the necessary management of those assets held in trust. However, to deal with assets which may not have been transferred to your living trust prior to your incapacity or which you may receive after incapacity, a durable power of attorney for property management should be considered. In such a power, you appoint another individual (the “attorney-in-fact”) to make property management decisions on your behalf. The attorney-in-fact manages your assets and functions much as a conservator of your estate would function, but without court supervision. The authority of the attorney-in-fact to manage your assets ceases at your death.

An advance health care directive/durable power of attorney for health care allows your attorney-in-fact to make health care decisions for you when you can no longer make them yourself. It may also contain statements of wishes concerning such matters as life sustaining treatment and other health care issues and instructions concerning organ donation, disposition of remains, and your funeral.

## **15** *Who should help me with my estate planning documents?*

- **Can I do it myself?** It is possible for a person to do his or her own estate planning with forms or books obtained at a stationery or book store or from the State Bar. At the least, a review of such forms can be helpful in preparing you for doing estate planning. If you do review such materials and have any unanswered questions, however, you should seek professional help.

- **Do I need a professional to help?** If you do seek advice, wills and trusts are legal documents which should be prepared only by a qualified lawyer. However, many other professionals and business representatives may become involved in the estate planning process. For example, certified public accountants, life insurance salespersons, bank trust officers, financial planners, personnel managers and pension consultants often participate in the estate planning process. Within their areas of expertise, these professionals can assist you in planning your estate.

The State Bar urges you to seek advice only from professionals who are qualified to give estate planning advice. Many professionals must be licensed by the State of California. Before retaining any professional to assist you with your estate plan, you should inquire about that individual's qualifications. In addition, you should determine whether the professional advisor has any underlying financial incentive to sell you a particular investment, such as an annuity or life insurance policy, because that financial incentive may color the advice given to you. Unfortunately, some sellers of dubious financial products gain the confidence and private financial information of their victims by posing as providers of estate or trust planning services.

## **16** *How do I find a qualified lawyer?*

Some lawyers who work in the estate planning area are "certified specialists in estate planning, trust and probate law." This designation means that they have met standards for certification set by the State Bar of California. However, not all lawyers who have experience and expertise in estate planning have sought that certification.

If you do not already know a lawyer who is qualified to help with your estate plan, obtain referrals from someone whose judgment you can trust—friends, associates, or your employer. Your local bar association maintains a list of State Bar certified lawyer referral services in your area. For an online list of certified lawyer referral services, visit the State Bar's web site at **[www.calbar.ca.gov](http://www.calbar.ca.gov)**.

You should be wary of organizations or offices which are staffed by non-lawyer personnel and which promote "one size fits all" living trusts or living trust kits. An estate plan created by someone who is not a qualified lawyer can have enormous and costly consequences for your estate and may not achieve your goals and objectives. Do not allow yourself to be pressured into immediately purchasing any estate planning product. When you retain a lawyer, you should understand what services are to be provided and how much they will cost. California law requires that a lawyer explain, in writing, the nature of the services to be rendered, the cost of those services and the payment terms. You should indicate your understanding of the terms and conditions of the lawyer's employment with a fee agreement prepared by your lawyer.

For more information, see the State Bar pamphlet *How Can I Find and Hire the Right Lawyer?* To find out how to obtain a complimentary copy of this pamphlet and other State Bar consumer education pamphlets, call 415-538-2280. Or visit the State Bar's web site — [www.calbar.ca.gov](http://www.calbar.ca.gov) — where you'll find the consumer education pamphlets, as well as information on ordering them. The pamphlets also can be ordered in bulk

## **17** *Should I beware of someone who is a “promoter” of financial and estate planning services?*

There are many who call themselves “trust specialists,” “certified planners” or other titles which are intended to suggest that the person has received advanced training in estate planning. California is experiencing an explosion of promotions by unqualified individuals and entities which have only one real goal—to gain access to your finances in order to sell insurance-based products such as annuities and other commission-based products.

Here are some helpful hints and suggestions:

- Before considering a living trust or any other estate or financial planning document or service, consult with a lawyer or other financial advisor who is knowledgeable in estate planning, and who is not trying to sell a product which may be unnecessary.
- Always ask for time to consider and reflect on your decision. Do not allow yourself to be pressured into purchasing an estate or financial planning product.
- Know your cancellation rights. California law requires that sellers who come to your home to sell goods and services (not including insurance and annuities) that cost more than \$25 must give you two copies of a notice of cancellation form to cancel your agreement. You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction.
- Be wary of home solicitors who insist on receiving confidential and detailed information about your assets and finances.

- Find out if any complaints have been filed against the company by calling local and state consumer protection offices or the Better Business Bureau.

- Know whom you are talking to and insist on identification of the person and a description of his or her qualifications, education, training and expertise in the field of estate planning.

- Always ask for a copy of any document you sign at the time it is signed.

- Report high-pressure tactics, misrepresentations or fraud to the police immediately.

## **18** *What are the costs involved in estate planning?*

The costs of estate planning depend on your individual circumstances and the complexity of documentation and planning required to achieve your goals and objectives. Costs may vary from lawyer to lawyer. The costs generally will include the lawyer's charges for discussing your estate plan with you and for preparing your will, trust agreement or other legal documents which you may need.

**The purpose of this pamphlet is to provide general information about the law, which is subject to change. If you have a specific legal problem, you may want to consult a lawyer.**

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